

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IBRAHIM FRANK FAYZ,

Defendant-Appellant.

UNPUBLISHED

February 1, 2007

No. 262684

Wayne Circuit Court

LC No. 04-012709-02

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was charged with breaking and entering, MCL 750.110, and larceny in a building, MCL 750.360. Following a bench trial, he was convicted of breaking and entering, and was sentenced as a fourth habitual offender, MCL 769.12, to 5 to 20 years in prison. He appeals as of right. We affirm.

Defendant first challenges the sufficiency of the evidence presented at trial. A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). This Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of breaking and entering are “(1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny or felony therein.” *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993).

Defendant did not break into the store himself. The evidence showed that the actual break-in was committed by Timothy Koskela. But a person who aids and abets in the commission of an offense may be charged, convicted, and punished as a principal. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). The elements that must be proven to convict a defendant as an aider and abettor are “(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the

crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.” *Id.* “Defendant’s specific intent or his knowledge of the principal’s specific intent may be inferred from circumstantial evidence.” *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986).

There is no dispute that Koskela committed a breaking and entering. There is also no dispute that defendant drove Koskela to and from the scene of the crime. Such conduct is sufficient to find that defendant aided and abetted in the crime if he intended, or knew that Koskela intended, to commit the crime. *People v Davenport*, 122 Mich App 159, 162; 332 NW2d 443 (1982). Given the evidence that defendant drove Koskela to the area where the market was located, waited while Koskela broke into the market, drove over to the market with his lights off to pick up Koskela after the theft, and drove away from the market with his lights off for a time and exceeded the speed limit, a rational trier of fact could infer that defendant knew what Koskela was doing and willingly assisted him by conveying him to the crime scene and attempting to help him get away undetected. Although defendant testified at trial that he did not know that Koskela was planning to break into the market and had no idea that he had done so until after the crime was committed, the trial court rejected defendant’s testimony as not credible. This Court will not substitute its judgment for that of the trial court but will defer to the trial court’s resolution of factual issues that involve the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997); *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993).

Defendant next argues that he is entitled to a new trial due to ineffective assistance of counsel. Following an evidentiary hearing, the trial court determined that counsel was not ineffective. Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. The trial court’s factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel’s performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel’s error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel’s conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff’d* 468 Mich 233 (2003) (citations omitted).]

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). “Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense.” *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant contends that counsel was ineffective for failing to call Koskela to testify on his behalf at trial. According to defendant, Koskela wanted to testify while defense counsel testified that Koskela vacillated. Assuming that Koskela was willing to testify at defendant's trial, the record does not indicate that he had any relevant testimony to offer. According to defense counsel, Koskela said that defendant was not involved in the offenses. According to defendant, Koskela stated in an affidavit that defendant had nothing to do with the offenses. Either way, the statement is untrue—defendant clearly was involved in the offenses in that he drove Koskela to and from the scene. Counsel is not ineffective for refusing to offer what she reasonably believes to be perjured testimony. *People v Hubbard*, 156 Mich App 712, 715-716; 402 NW2d 79 (1986). The critical issue was whether defendant intended to commit the crimes or knew that Koskela intended to commit the crimes when he provided assistance. The testimony at the hearing did not show whether Koskela could offer any evidence relevant to that issue. Therefore, the trial court did not err in finding that defendant failed to meet his burden of proving that counsel was ineffective.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper